In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-675

MARTIN SCHWARTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to support his conviction.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341 and 2; on one count of pledging as security for a loan goods and merchandise that had been unlawfully converted and taken, in violation of 18 U.S.C. 2315 and 2; and on one count of receiving, concealing, storing, selling, and disposing of goods and merchandise that had been unlawfully converted and taken, in violation of 18 U.S.C. 2315 and 2.[1] He was sentenced to concurrent

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[1]Indicted with petitioner was Harold Von Maker, a/k/a Peter Wertz. He has never been tried for these offenses, however, because he became a fugitive.

terms of two years' imprisonment on each count. The court of appeals affirmed by memorandum order (Pet. App. A).

The evidence showed that in September 1972, petitioner, an attorney, agreed to represent Peter Wertz and Wertz' company, Antique Investors, Inc. (Tr. 965-969).[2] Antique Investors was engaged in buying and selling art works. Petitioner also became Wertz' business partner in a company formed to market salad vegetables grown in the Dominican Republic (Tr. 383-385, 984-989).

In October 1973, Wertz agreed to purchase three paintings from Maxwell Galleries for $100,000, among them one by Jackson Pollock (Tr. 22, 35). Payment was due within thirty days (Tr. 22, 42). Wertz did not pay within the agreed period of time (Tr. 113), and the gallery was never paid for the paintings (Tr. 78-79).[3]

At about this time petitioner learned that Wertz' real name was Von Maker (Tr. 710-711, 1014-1015, 245-247); that Von Maker was a convicted felon (Tr. 1015) and a confidence man (Tr. 711); that Von Maker previously had failed to pay for jewelry and other paintings that he had acquired from third persons (Tr. 1179-1182); and that Von Maker had never paid for the Jackson Pollock painting (Tr. 143-144).

During the same period, petitioner and Wertz obtained a loan of $100,000 from K.R.R. Associates (G. Exhs. 56, 56-A; Tr. 306). Although petitioner represented to the

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[2]"Tr." refers to the trial transcript.

[3]On December 7, 1973, Wertz sent two checks totalling $90,000 to Maxwell Galleries; neither check was backed by sufficient funds and no payment was ever collected on either check (Tr. 67-69, 127-130).

President of K.R.R. Associates that the money would be invested in Antique Investors (Tr. 307), most of it was invested in the salad vegetable company (Tr. 1003-1008). Petitioner and Wertz defaulted on the loan (Tr. 309-323).

On November 28, 1973, petitioner pledged the Jackson Pollock painting as collateral for a $75,000 loan from a New York State bank (Tr. 360-361, 493, 1011). He gave the bank a purported bill of sale from Wertz to petitioner as proof of petitioner's ownership of the painting (Tr. 362); petitioner also had a bill of sale from H.E. Sloan to Antique Investors (Tr. 490-494, 614-615). Petitioner invested a substantial portion of that loan in the salad vegetable company (Tr. 1011-1013).

Petitioner then endeavored either to sell the entire art inventory of Antique Investors (Tr. 494), or to obtain a loan by using the paintings as collateral (Tr. 500-501). When petitioner attempted to sell the Jackson Pollock painting to undercover F.B.I. agents, he was arrested (Tr. 716-721).

After his arrest, petitioner stated that he knew that the Maxwell Galleries owned the Jackson Pollock painting, that Wertz had never paid for the painting, and that the purported bill of sale from H.E. Sloan to Antique Investors was fraudulent (Tr. 722, 826-827).[4]

Petitioner contends that the evidence was insufficient to show his knowing participation in the attempt to defraud. Viewed in a light most favorable to the government, however (*Glasser* v. *United States*, 315 U.S. 60, 80),

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[4]At trial, petitioner denied making this statement (Tr. 1261).

there was ample evidence to support the jury's conclusion that petitioner was aware of the fraud. As the court of appeals observed (Pet. App. 2a):

> The crucial question here was the extent and time of [petitioner's] knowledge of Von Maker's fraud. We are satisfied that the jury on the evidence before it was justified in inferring that [petitioner] had knowledge of the fraud before his own knowing participation in the transactions charged.

It therefore is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

DOJ-1975-12